1952.

K

File No. B Prohibition 52

Legal Department

B BRANCH

Subject:—

L.A. Bill No ~~XXXV~~

of 1952

A Bill to amend the Bombay Prohibition Act 1949

Bombay Act No XXVI of 1952

P.S. E

(Pts I, II & III bound together)

B Prohibition 52

Legal Department.

The changes proposed to be made in the Bombay Prohibition Act, 1949, are incorporated in the appended Bill on the assumption that the views expressed by the High Court in the Prohibition case are correct in law and are to be acquiesced in.

2. The important changes are:-

(1) Clause 2(3)(a)(u) :- It was contended in the Prohibition case that the control of all liquids containing alcohol or of all liquors by the provisions of the Bombay Prohibition Act is not warranted. The legislative power given by the Constitution is with respect to 'intoxicating liquors' and not all liquors whether intoxicating or not. This question was considered in America, and it was held that liquors containing alcohol over a certain percentage could be held to be intoxicating. Following the provisions of various American Acts, it is considered that liquors containing not more than $\frac{4}{7}$ per cent. of alcohol would not be intoxicating. The amendment in section 2(24)(a) by this clause is intended to carry out that object.

(2) Clauses 4 and 7:- The High Court has held that under the Prohibition Act the Legislature cannot prevent the legitimate use of alcoholic preparations which are not beverages, nor the use of medicinal and toilet preparations containing alcohol. This remark was makde with reference to restrictions put on

Eau de Cologne and levender and the attempt of the Prohibition Department to control even fruit juices. The remark equally applies to the control over denatured spirit. These clauses provide that the provisions of the Prohibition Act would not apply to the possession and use of such liquids, although their sale and manufacture could be controlled.

(3) Clause 11 :- The High Court held that facilities given to the Armed Forces and cargo boats offend against the fundamental right of equality. Section 39 which is ultra vires is therefore deleted.

(4) Clauses 14 and 26:- Following its own decision in the City Civil Court case, the High Court has held that sections 52 and 139(c) offend against the principle of delegated legislation. These clauses omit those proviions.

(5) Clauses 19, 20, 21 and 27:- The High Court held that references in certain sections 'commending the use of intoxicant' and the evasion of the provisions of the Prohibition Act are very wide and offend against such fundamental rights as freedom of speech etc. These clausss omit references to commend and evasion. Similarly, the provision in section 53 that every licence or permit will provide that the holder will give an undertaking not to frustrate or defeat the object and purposes of the Act is also opposed to fundamental rights. That provision is being omitted.

(6) Clause 25:- Section 136 relates to prosectuion, detention and restriction on movements of persons who may be found about to commit certain prohibition offences. The High Court held that this provision is opposed to the Constitution. Section 136 is ommitted.

(7) Clauses 16 and 18:- Sections 63 and 64 relate to the fixing of the price and requisitioning of molasses. Although control over the manufacture, sale etc. of molasses would be legal, it may be held that the fixing of the price of molasses or requisitioning thereof would not be germane to the polity of Prohibtion and would be outside the scope of the Act relating to Prohibition. These sections and section 71 are therefore ommitted. It would be open to include molasses in the list of essential commodities under the Bombay Essential Commodities and Cattle Control Act, 1946, and to control their prices, if it is considered necessary to do so.

3. The amendments made by other clauses of the Bill are of formal or verbal nature and purport to carify certain provisions and to remove certain administrative difficulties of formal nature.

Sd/- J.R.D.
Additional Secretary to Government.

H. Secy. R.D., No. 695-Confl., dated the 12th September 1950.

EVY. 3/7.

Ex Parte : Province of Bombay

Re: Setting draft Bill.

O P I N I O N.

We have considered the various sections of the draft Bill in Joint conference with Mr. J.R. Dhurandhar and we give below our opinion on the questions involved.

1. Section 3 of the Amending Act and section 7 of the Amending Act go together. We are of opinion that the proposed section 24A(1) does not carry out the object for which the section is to be enacted, namely, to prevent the misuse of medicinal and toilet preparations containing alcohol.

We are of opinion that in place of section 24A (1) the provisions of section IV of the National Prohibition Act of the United States (see Balcmore Black p. 365) with appropriate alterations should adopted. The Supremem Court has held that the possession and consumption of toilet and medicinal preparations cannot be forbidden because of possible misuse. But the judgment of the High Court shows that the misuse of these articles can be prevented. Section IV of the American Act, which deals with "exempted liquors" furnishes a precedent designed to prevent the misuse of exempted liquors. If our opinion is accepted section 3 of the Amending Act will be unnecessary and should be deleted.

2. We are of opinion that it would be inexpedient to insert a new sub-section, sub-section (2) to section 39 of the Act as is proposed to be done by section 14 of the Amending Act. In the argument before the High Court and the Supreme Court considerable emphasis was laid on the discipline and control enforced in messes and canteens. and would be inexpedient, if not unwise, expressly to

give a gobye to that argument. In our opinion the desired result can be produced by amending section 39 so as to provide for sale of liquor at messes and canteens to the armed forces subject to condition to be prescribed as regards quentity etc.

3. As regards former Indian Rulers we are of opinion that no statutory exemption should be made in their favour. The classification of former Indian Rulers for the purposes of the Prohibition Act would be regarded as arbitrary and capricious and very probably such a statutory provision would be held invalid. In dealing with the former Indian Rulers, Government can act under section 139(c) after considering the circumstances of each case.

4. We are of opinion that a provision cannot be validly inserted to punish a person who consumes intoxicants outside the State and enters the State in an intoxicated condition but who does not create any breach of the peace or any overt act which is punishable.

Such a provision would be held bad (a) as an attempt to legislate extra-territorially, a power which State Legislatures have not got (b) as an unreasonable restriction on the rights conferred by art. 19(1)(f) of the Constitution to acquire, hold and dispose of property, consumption being a mode of disposal. By declaring a particular thing noxious, the State can destroy property in it; but it cannot do this as regards property outside the State. If a person drinks outside the State, when drinking is not an offence, then to punish <u>mere</u> intoxication would voilate article 19(1)(f). Of course if intoxication results in disorderly conduct such conduct is punishable under the Indian Penal Code. (c) Mere intoxication may be the result of taking liquor for medicinal purposes, and if such a plea is raised it would be hard to refute. And if no provision is made for "intoxication" arising from "drinks" for medicinal purposes, the section would be attached as an unreasonable restriction on fundamental rights.

SD. C.K. Daphtary. 27-8-51.
Sd. H.M. Seervai. 27-8-51.

EVY. 3/7.

Office of the R.L.A.

A revised draft Bill to amend the Bombay Prohibition Act, 1949, in the light of the suggestions contained in the demi official letter of the Director of Excise and Prohibition No. 64-22(FL II) dated the 31st August 1951 (copy enclosed) is sent herewith subject to the following remarks:-

2. Para (1) of the Director's letter- It is true that the Supreme Court has not specifically held the provisions of the Bombay Prohibition Act, 1949, in so far as they relate to import, export or manufacture of of medicinal or toilet preparations containing alcohol as ultra vires; but have held the provisions of the said Act in so far as they relate to the purchase, possession, sale, consumption or use of the said preparations only as being invalid. But the question of import, export or manufacture of the said preparations could not be cancassed either before the High Court or the Supreme Court. The question was decided with reference to certain notifications issued by the State Government regarding the sale of the said preparations. The Supreme Court has held the provisions of the Act in so far as they relate to possession of the said preparations as invalid and the provisions of the Act in so far as they relate to import, export or manufacture may in all probability be held invalid, as no person can either import, export or manufacture any such preparation without possessing it. In short, the effect of the Supreme Court ruling is that these operations in relation to medicinal and toilet preparations cannot be prohibited under the Prohibition Act. The raison de etre of the Supreme Court's decision is that the ordinary and reasonable use of medicinal and toilet preparations containing alcohol cannot be regarded to be their use as intoxicating liquor within the ..

Legislative item 'intoxicating liquor' whether under the Government of India Act, 1935, or the Constitution and therefore "the Act is not a law is not a law imposing reasonable restrictions so far as medicinal and toilet preparations containing alcohol are concerned." Although the actual question of manufacture was not before the Supreme Court its observations relating to possession etc. must apply to manufacture. The view expressed by the Director that the manufacture of the said preparations is not affected by the Supreme Court Judgment is not correct. Clause 7 of the revised draft accordingly provides for excluding medicinal and toilet preparations containing alcohol from the purview of Chapter III relating to Prohibitions. There is however no objection to the insertion of new sections 107A and 107B as suggested by the Director. Under clause 39 the necessary amendments have been made.

2. As suggested by the Solicitor General and Shri H.M. Seervai a provision has been made on the lines of section 4 of the American Act by inserting Chapter IV-A for the purpose of controlling or regulating medicinal and toilet preparations containing alcohol, to prevent their use as intoxicating liquors. It will not be correct to provide that medicinal preparations containing alcohol cannot be used for beverage purposes. Medicinal preparations which are to be drunk are to be used as beverages. Tge proper provision that should be made is that they should not be used as intoxicating liquors. New section 59A (see clause 25) provides accordingly.

3. As regards the misuse or abuse of drugs like "Tincture Jingiberi-s-Mitis", it may be pointed out that misuse of such drugs can be controlled under the Drugs Act, 1940(see section 18). That would be in consonance with the judgment of the Supreme Court. Under section 18

of the Drugs Act, the State Government is competent to provide that any drug specified in the notification issued by it shall not be sold except under a licence or subject to the conditions therein. Action under the Drugs Act will have to be taken in consultation with the Controller of Drugs and the Health Department. The Controller of Drugs will be able to advise whether it is necessary to control the sale of any other drugs which are li-kely to be misused.

4. Para 5 of Director's letter - The proposal of the Director to amend section 39 so as to delete reference to the members of army forces and crews on a ship in not in order. It amounts to classify the Armed forces under an executive order. The classification should appear in the Act itself.

5. Para 6 of the Director's letter- It is true that the word "temporarily" is being deleted from proviso (a 1) to sub-section (1) of section 40 of the Act. Even thus amended the proviso means that a permit for the use or consumption of foreign liquor may be granted to a person who was either born and brought up or domiciled in any country outside India where such liquor is being generally used or consumed, provided that such person has a fixed and settled purpose of making his sole and permanent home in any country outside India. The contention of the Director that only because the word "temporarily" is being deleted from proviso (a 1), it would be incumbent upon the licensing Officer to grant him permit on the ground that he is a citizen of India is not correct. A person who is born and brought up or domiciled in any country outside India and has a fixed and settled purpose of making his sole and permanent home in any country outside Indiam cannot be deemed to be a citizen of India as assumed by the Director. It is not therefore necessary to amend clause 40 further as suggested by the Director.

6. There is no objection to accept the proposals of the Director contained in paras (2), (3), (4), (7), (8), (9), (10), (11), (12) and 15 of his letter. The revised draft carries out the said proposals. It will be desirable to show it to the Advocate General and Counsel Shri Seervai before it is finalised.

Sd/- T.R.D

Remembrancer of Legal Affairs.

U.R. to R.D., No. 18536, dated the 20th November 1951.

EVY. 4/7.

Legal Department.

Statement of the case.

After the Supreme Court's decision declaring the Bombay Prohibition Act as intra vires with certain exceptions was given a draft Bill to amend the Bombay Prohibition Act, 1949, was prepared in order to bring the Act inte line with the decision of the Supremem Court and was shown to the Solicitor General and Shri H.M. Seervai. They considered the various provisions of the draft Bill and offered their joint opinion on the questions involved. New section 24A (clause 7 of the proposed Bill) provided inter alia as follows:-.

Prohibitions not applicable to certain articles.

"24A. Nothing in this Chapter shall be deemed as prohibiting any person -

(1) from manufacturing, possessing, transporting, selling purchasing, consuming or using any intoxicant which is a medicinal or toilet preparation containing alcohol and which is intended for use as such, or ------ "

With reference to this section, the joint opinion observed as follows:-

"We are of opinion that the proposed section 24A(1) does not carry out the object for which the section is to be enacted, nemely, to prevent the misuse of medicinal and toilet preparations containing alcohol. We are of opinion that in place of section 24A(1) the provisions of section IV of the National Prohibition Act of the United States (see Blackmore p. 365) with appropriate alterations should be adopted. The Supreme Court has held that the possession and consumption of toilet and medicinal preparations cannot be forbidden because of possible misuse. But the judgment of the High Court shows that the misuse of these articles can be prevented. Section IV of the American Act, which deals with "exempted liquors" furnishes a precedent designed to prevent the misuse of exempted liquors."

2. The R.L.A. thereupon revised the proposed new section 24A as follows:-

Exemption of toilet and medicinal preparations.

24A. Nothing in this Chapter shall be deemed to apply to the manufacture, sale, purchase, transport, possession, consumption or use of -

(1) any toilet preparation containing alcohol which it is intended to be used for the purpose of toilet and not as a beverage;

(2) any medicinal preparation containing alcohol which is intended to be used for medicinal purposes and not for any other purpose:

Provided that such medicinal preparation is prepared in accordance with the Standard British Pharmacopoeia or the British Pharmaceutical Codex or any other pharmacopoeia recognized in this behalf by the State Government of in accordance with a formula prescribed by the State Government in this behalf."

3. This draft was shown to the Director of Prohibition who offered his remarks on new section 24A (clause 7) in the following terms, namely:-

"The manufacture of spirituous medicinal and toilet preparations is to be declared exempt from the prohibition Chapter, and will therefore be possible without licence. I Beg to submit, with respect, that the judgment of the Supreme Court has not declared the restrictions on such manufacture invalid. The provisions of the whole Act were under scrutiny both in the High Court and in the Supreme Court, and the applicant made every effort to attack every provision which was found open to challenge. The arguments were not confined merely to the facts of the particular case of the applicant, and in fact the Courts held some of the provisions (e.g. Section 136) to be invalid though they did nor arise from the facts of the case. The Supreme Court's judgment was expressed after full canvassing of both sides and scanning of the whole Act, and it has, after holding that particular provisions were invalid,

declared that the rest of the Act was valid. Though the restrictions on possession, consumption and use of these preparations are invalid it does not necessarily follow by inference that restrictions on manufacture are also invalid.

In this connection I have to say that the licensing of manufacture is necessary for two reasons (a) to levy the excise duty which already being levied and can be continued until Parliament otherwise directs, and (b) to check spurious preparations, which may be liable to abuse. I submit that the licensing of industries for the purpose of levying a duty or tax is not an unreasonable restriction, and it is in fact quite usual provision in excise and other fiscal Acts, and I may quote the following which I happen to recall:-

Central Excises and Salt Act, 1949; Section 6;

Bombay Sales of Motor Spirit Taxation Act, 1946: section 6;

Bombay Sugarcane Cess Act, 1948: section 5.

The State has also got legislative powers under entries 24 and 27 of the State List in the Constitution for regulatin Industries and Production under which such licensing could be justified."

4. The R.L.A. then furnished a revised draft, clause 7 (i.e. new section 24A) of which ran as follows:-

"24A. Nothing in this Chapter shall be deemed to apply to -

(1) any toilet preparation containing alcohol which is unfit for use as intoxicating liquor;

(2) any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor;

Provided that such preparation corresponds with the description and limitations mentioned in section 3 59A".

5. The R.L.A. offered the following remarks with reference to the revised clause 7, namely:-

"It is true that the Supreme Court has not specifically held the provisions of the Bombay Prohibition Act, 1949, in so far as they relate to import, export or manufacture of medicinal or toilet preparations containing alcohol as ultra vires; but have held the provisions of the said Act in so far as they relate to the purchase, possession, xx sale, consumption or use of the said xx preparations only as being invalid. But the question of import, export or manufacture of the said preparations could not be canvassed either before the High Court or the Supreme Court. The question was decided with reference to certain notifications issued by the State Government regarding the sale of the said preparations. The Supreme Court has held the provisions of the Act in so far as they relate to possession of the said preparations as invalid and the provisions of the Act in so far as they relate to import, export or manufacture may in all probability be held invalid, as no person can either import, export or manufacture any such preparation without possessing it. In short, the effect of the Supreme Court ruling is that these operations in relationx to medicinal and toilet preparations cannot be prohibited under the Prohibition Act. The raison-de-etre of the Supreme Court's decision is that the ordinary and reasonable use of medicinal and toilet preparations containing alcohol cannot be regarded to be their use as intoxicating liquor within the Legislative them 'intoxicating liquor' whether under the Government of India Act, 1935, or the Constitution and therefore "the Act is not a law imposing reasonable restrictions so far as medicinal and toilet preparations containing alcohol are concerned." Although the actual question of manufacture was not before the Supreme Court its observations relating to possession etc.must apply to manufacture. The view expressed by the Director that the manufacture of the said preparations is not affected by the Supreme Court Judgment is not correct. Clause 7 of

the revised draft accordingly provides for exclusing medicinal and toilet preparations containing alcohol from the purview of Chapter III relating to Prohibitions."

A provision was also made in the revised draft as suggested by the Solicitor General and Shri H.M. Seervai on the lines of section 4 and 5 of the American Act (copies of clauses 25 and 29 enclosed for ready reference) for the purpose of controlling or regulating medicinal and toilet preparations containing alcohol to prevent their use as intoxicating liquors. It was specifically pointed out that the proper provision which should be mad is that medicinal and toilet preparations containing alcohol should not be used as intoxicating ~~in~~ liquors.

6. The Officer on Special Duty, Shri M.D. Bhansali, in his letter of 7th January 1952 at pp. 23-31 ante, has submitted fresh 'proposals for regulating the import, export, transport, possession, sale, purchase, consumption and use of toilet and medicinal preparations. He has taken the view that toilet and medicinal preparations could be regulated in virtue of the provisions of section 31 and 139(b) of the Bombay Prohibition Act. According to his proposal, the manufacturer of spirituous preparations, including toilet and medicinal preparations, should be permitted either to export or to sell wholesale to a licence holder who would be granted a licence for the wholesale sale of spirituous preparations. The licence, according to him, will entitle its holder to obtain supplies of all spirituous preparations, including toilet and medicinal preparations, either from bonded manufactories in the State or from authorised dealers outside the State and to sell such preparations to chemists and other retailers in the State. The Special Officer has obviously misconstrued the decision of the Bombay High Court and of the Supreme Court relating to toilet and medicinal preparations. In other words the Special Officer (Shri Bhansali) contends that the Supreme Court has not ..

declared the provisions contained in section 12(a) and (c) of the Bombay Prohibition Act, 1949, ultra vires in so far as they restrict manufacture, import export and transport of medicinal and toilet preparations containing alcohol. He, therefore, urges that although a total ban on manufacture, import, export and transport of such preparations cannot be placed, the regulation and control thereof by rules and order issued by Government under sections 31 and 139(b) of the Bombay Prohibition Act, 1949, and licences granted thereunder can be made. In other words the proposal of Shri Bhansali is that it would be legal for Government, without undertaking any amendment of the Act as in clauses 3, 7 and 25 of the proposed draft Bill or without having any recourse to such enactments as the Drugs Act, to issue order or rules under sections 31 and 139(b) of the Bombay Prohibition Act, 1949, for the regulation and control of the manufacture, import, export or transport of such articles as tincture zingberis which are used as substitutes of intoxicating liquors.

7. The above view of the Special Officer (Shri Bhansali which is shared in by the Prohibition Department is not correct. In the first place, it is wrong to hold that because the Supreme Court has held that clause (c) of section 12 so far as it affects the possession of, clause (d) so far as it affects the sale or purchase of, and clause (b) of section 13 of the Bombay Prohibition Act, so far as it affects the consumption of, medicinal and toilet preparations are ultra vires, the decision does not apply to the manufacture, import, export and transport of the said articles. The case in which the decision of the Supreme Court was delivered arose out of and applications made by Shri Balsara for a writ of mandamus in so far as his alleged right for the possession, purchase and consumption or use of the article which were in his possession. Among the articles in his possession

were a bottle of cologne water and lavendar. It is tmue that one of his prayers was that the whole of the Bombay Prohibition Act was in contravention of the fundamental rights of a citizen and was beyond the legislative competenace of the Provincial legislature. This contention of the petitioner was not accepted by both the High Court as well as the Supreme Court. So far as the specific provisions of the Act in asmuch as the rights of the peritioner as an individual was concerned, the Supreme Court held that the particular provisions of the Act specified in the concluding portion of its judgment to be illegal and ultra wires. The petitioner was neither a manufacturer nor a dealer in wines or medicinal or toilet preparations. He could not, therefore, apply for specific reliefs regarding the validity of the provisions in section 12 of the Act relating to the manufacture, import or export. But all the decision of the Supreme Court relating to the possession, sale, purchase and consumption of medicinal and toilet preparations apply equally to their manufacture, import, export and transport. Any argument that they do not so apply will be ridiculous and has no substance.

8. So far as medicinal and toilet preparations are concerned the decision of the Bombay High Court was based on two grounds:-

(1) Medicinal and toilet preparations are not intoxicating liquors. If they are to be held as falling within the definition of liquor in section 2(24) of the Bombay Prohibition Act, the said definition is beyond the legislative competence of the Provincial Legislature under item No. 31 in List II in the seventh Schedule to the Government of India Act, 1935 (Item No. 8 in List II in the Seventh Schedule to the Constitution).

(2) The provisions of the Bombay Prohibition Act, 1949, and the various notifications issued thereunder regarding the sale, consumption and use of medicinal and toilet preparations containing alcohol are inconsistent

with the provisions of article 19 of the Constitution, as they amount to the inposition of restriction on such sale, consumption and use in an unreasonable manner.

The reasons for the first ground are contained in the following passage in the decision of the Bombay High Court:-

> "We have next to consider the scope of the words "intoxicating liquor". In the first instance "liquor" ordinarily means a strong drink as opposed to a soft drink, but it must in any event be a beverage which is ordinarily drunk. In the second place, the use of the word "intoxicating" in Item 31 in contradistinction to the use of the word "alcoholic" in Item 40(a) as qualifying the word "liquor" is very significant. We may also point out that in the white Paper item 26 which corresponded to entry 31 used the word "alcoholic" & liquors which have in the Government of India Act been changed in to "intoxicating" liquors. Therefore it is apparent that from the class of alcoholic drinks non-intoxicating drinks are excluded by this entry. Thirdly, medicinal and toilet preparations containing alcohol which are found in entry 40(c) are neither liquor nor intoxicating and therefore they are obviously excluded from the scope of Item No. 31."

The reasons for the second ground are contained in the following observations of the Bombay High Court:-

> "These cases in our opinion establish that the Legislature may in order to enforce prohibition of intoxicating drinks prohibit the possession, use and consumption of any drinks however small the percentage of alcohol in them and whether they are in fact intoxicating or not, but it cannot prevent the possession and legitimate use of non-beverages and medicinal and toilet preparations containing alcohol. It may if it thinks fit prohibit their use for noxious purpose viz., for use or conversion for use as a substitute f an intoxicating drink ....

Therefore, we are of the opinion that although the Legislature may while legislating under item 31 prevent the consumption of non-intoxicating beverages and also prevent the use as drinks of alcoholic liquoids which are not beverages nor the use of medicinal and toilet preparations containing alcohol."

It is clear from the above reasons that they were limited to the interpretation of the words "intoxicating liquor" in item No. 31(i.e. item No. 8 in the present Constitution But if the High Court's decision had remained unchallenged or was confirmed by the Supreme Court on this pont, its finding that medicinal and toilet preparations containing alcohol are neither liquors nor intoxicating liquors on the first ground mentioned above would have remained inact

9. The Supreme Court did not agree with the High Court on the first ground. The following observations of the Supreme Court are relevant on the pohnt:-

> "According I consider the appropriate conclusion to be that the word "liquor" covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word "liquor" in common parlance especially when that word is prefixed by the qualifying word "intoxicating", but in my opinion having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term "intoxicating liquor" as used in entry 31 of List II ... ... The wider definition of the word "liquor" would have to be adopted so as to include all alcoholic liquids which may be used as substitutes for intoxicating drinks, to the detriment of health. On the whole, I am unable to agree with the High Court's finding and held that the definition of

"liquor" in the Bombay Prohibition Act
is not ultra vires.

As regards the Second ground on which the decision of the High Court is based, it appears that the Supreme Court was in substantial agreement therewith. The Supreme Court observes:-

> "I am substantially in agreement with the line of reasoning adopted by the High Court and I consider ~~&~~ that the Act is not a law imposing reasonable restri - ctions so far as medicinal and toilet preparations containing alcohol are concerned. The National Prohi- bition Act or the Volstead Act of America, to which I have referred, was also an Act relating to prohibition but toilet and medicinal preparations, containing alcohol were expressly excluded from the ~~xxx~~ scope of that Act. I refer to that Act simply to show that a complete scheme of prohibition can be worked without including such articles among those prohibited. Again, Article 47 of the Constitution also takes note of the fact that medicinal preparations should be excluded in the enforcement of prohibition. ~~It~~ I do not consider that it is reasonable that the possession, sale, purchase, consumption or use of medicinal and toilet preparations should be prohibited merely because there is a mere possibility of their being misused by some perverted addicts."

The Supreme Court then referred to various notifications issued by the Prohibition Department regarding the possession, sale, purchase, consumption and use of medicinal preparations and has pertinently remarked "Even these notifications may be withdrawn, superseded or amended at any moment" It then comes to the following conclusion: "Having given ~~xxx~~ my careful consideration to the matter, I am of opinion that the restrictions imposed in the Act even when read with the above notifications are not reasonable and I would affirm the conclusion arrived at by the High Court."

10. For the above reasons, the following points arise for the consideration of the Counsel:-

(1) Whether it would not be proper to hold that the decision of the Supreme Court regarding the possession, sale, purchase, consumption and use of medicinal and toilet preparations equally applies to the manufacture, import and export thereof;

(2) Whether any restrictions can be imposed in respect of the said articles by rules, orders or condition in licences as proposed by the Prohibition Department;

(3) Whether any restrictions to be imposed on medicinal and toilet preparations should not be restricted strictly with reference to their use as intoxicating liquors and not with respect to any other use i.e. for medicinal and toilet preparations;

(4) Whether it would not be necessary to include provisions in the Bombay Prohibition Act to provide for the determination of the question whether a particular article is strictly a medicinal or toilet preparation or is intoxicating liquor. In this connection it would be necessary to distinguish medicated wines from medicinal preparations.

(5) If the Prohibition Department considers that in order to make the policy of prohibition effective it is necessary to control and regulate the use of such drugs as tincture zingeberis which are being misused to the detriment of public health, the proper method would not be to have recourse to such enactment as the Drugs Act, 1940 or to promote legislation under the power of the State Legislature under item No. 6 Public Health in List II in the Seventh Schedule to the Constitution or under item No. 9 in List III to the said Schedule

If the matter is acute and immediate steps are necessary to stop the abuse of such drugs, it should be considered whether the provisions of the Bombay Essential Commodities and Cattle Control Act, 1947 cannot be used to control and reguate the sale, manufacture and import of such drugs. The Schedule to that Act contains drugs. Clauses 3, 7 and 25 of the appended draft Bill purport to carry out the objects underlying points No. 1 to 4, clause 39 is intended to enable the Department to levy and recover duties which can be imposed on such articles. These clauses have been modelled on the lines of section 4 of the American National Prohibition Act as suggested by Shri Daftary and Seervai. Section 18 of the Drugs Act, 1940, would enable Government to control and regulate the manufacture, import and export of drugs like tincture zingeberis which are being misused. If necessary, separate legislation can be undertaken for the purpose as stated above.

Sd/- J.R.D.

Additional Secretary to Government.

The Advocate General and Mr. Seervai may be requested to give joint opinion in this case.

Sd/- J.R.D.
8/2.

EVY. 4/7.

157 - Confl. 8-2-52 Secy. R.D

a.h.To Advocate General No. 158 Confl. 11-2-52

ADVOCATE GENERAL'S CHAMBERS,

HIGH COURT,

No. 3 of 1952. BOMBAY, 3rd MARCH, 1952.

U.R. to the Advocate General

No. 198-Confl. dated 11-2-1952.

JOINT OPINION.

Question 1. We are of the opinion that it would be proper to hold that the reasoning underlying the judgment of the Supreme Court applies to the manufacture, import and exper of medicinal and toilet preparations as it does to the possession, sale etc. of such preparations. As the petitioner Fram Dalsara was not a manufacturer, importer or exporter of these preparations no such question arose for the determination of the Supreme Court; but the principle is clear, namely, that the possession etc. of these preparations cannot be prohibited because of possible misuse -- though as the Solicitor General and Mr. Seervai pointed out in their joint opinion the misuse of these preparations may be prevente Any attempt to prohibit the possession, sale, use etc. of medicinal and toilet preparations by trying to regulate the manufacture etc. of such preparations -- would be an attempt to do indirectly what cannot be done directly and it has been repeatedly held that such an attempt must fail. Control and regulation of manufacture, import and export of medicinal and toilet preparations would be permissible (a) for levying a tax or duty (b) for preventing the misuse of such preparations.

Question 2. We are of opinion that it would be much better and much safer to provide for regulation by treating these preparations as exempted liquors on the lines of the National Prohibition Act of the United States. We are of opinion that such regulations should not be attempted by rules, orders and conditions of licence under the Act as unamended, for the scheme of the unamended act was to prohibit possession use, etc. of these preparations because of possible

abuse and not to guard aginst the misuse of these preparations and regulations and orders issued under the act will be attacked on the ground that they effectuate a policy which the Supreme Court has condemned. The amendments drafted by the R.L.A. give effect to the judgment by exempting toilet and medicinal preparations from prohibition and having done so they provide against misuse which is the only permissible thing under the Supreme Court judgment.

Question 3. Yes; in other words the misuse of the preparations may be prevented.

Question 4. Yes; it would be desirable for such determination and the draft section 6A does so. But in our opinion S. 6A(6) should be amended. That section makes the decision of Government final and a serious question may arise whether in a matter affecting fundamental rights Government can shut out inquiry by making their decision final and thus shutting out inquiry by the Court. The object of Government can be achieved if the last sentence of S.6A(6) is redrafted in some such form as this:- "On obtaining such advice the State Government shall determine whether any such preparation is unfit for use as intoxicating liquor or not and shall make a declaration that it is or is not unfit for such use and on such declaration being made it shall be presumed that such preparation is or is not fit for such use as the case may be."

Of course the drafting department will have to put the idea in proper form; we have merely suggested that a court shall presume that the declaration made by Government is correct so that the burden of proof will be on the person assailing the decision to prove affirmatively that it is wrong.

Question 5. Since Ginger is referred to in this question we may invite attention to Blakemore in Prohibition 3rd Edition pages 371 - 373. We cite only one or two passages "The possession of Jamaica ginger, put up in accordance with the United States Pharmacopoeia, is recognized as having a proper medicinal value and use, and is not an unlawful possession of intoxicating liquor" The evils intended to be prevented were the evils of intoxication. If a person sells a medicine as a beverage, he may be punished forso doing, but, as long as it is lawful to sell a medicine, it cannot be a crime to have possession of it".

If, however, a particular drug is being extensively misused as an intoxicating liquor the proper course is to make provisions in the Drugs Act for it. We do not think that such a drug would come within the spirit of the "Essential Commodities Act" for the very preamble states "Whereas it is expedient to provide for the control etc. .. of certain commodity essential to the life of the community etc."

We may, however, state that the American cases cited on behalf of the State in Fram Bulsara vs. The State show that statistical material was placed before the states legislature relating to pauperism, crime, unemployment etc. arising from drink. Before the Querist takes action in respect of any drug, such as ginger, it should be ascertained whether the consumption or production and consumption of the drug has increased so much that the only fair inference is that the drug is being misused. If, for instance, say 1000 tons of Eau de Cologne were sold every-month for 3 years before prohibition and if after prohibition the consumption shoots up to 10,000 tons it is clear that Eau de Cologne is being extensively drunk. But in respect of any such drug of toilet preparation statistical material should be put before the legislature or made available to the publiin a whites or blue book or a press note

Sd/- M P Amin 4/3

THE ADVOCATE GENERAL OF BOMBAY.

EVY. 4/7.

H M Seervai 4/3

Legal Department.

Para 2(a) on p. 275: The first point raised by the Director of Prohibition in para 2(a) of his memorandum is that the manufacture, import, export and transport of medicinal and toilet preparations containing alcohol should not be exempted from the provisions of Chapter III of the Bombay Prohibition Act. The R.L.A.'s opinion No. 18536 dated 20th November 1951 it was pointed out that the Supreme Court's decision regarding the sale of these preparations applies equally to their manufacture, import, export and transport and the said operations could not be prohibited under the prohibition Act. This view has been confirmed by the joint opinion of the Advocate General and Shri Seervai and they have agreed that the control and regulation of these operations would be permissible (a) for levying a tax or duty, and (b) for preventing their misuse. They have also stated that the amendments suggested by the R.L.A. give effect to the decision of the Supreme Court.

2. Para 2(b) on p. 276: The second point raised by the Director is that the word "temprearily" should be retained in previso (a1) to section 40(1) of the Prohibition Act. This suggestion may be accepted, although the reason given by the Director and based on articles 5 and 8 of the Constitution is not correct. Clause 16 of the draft Bill has been amended accordingly.

3. Para 2(c) on p. 277: The third point raised by the Director regarding the amendment of sections 105 and 106 can be met with by amending sections 105 and 106 in the following manner:-

(1) In section 105 ~~of~~ for the words and figures "in accordance with the provisions contained in Chapter IV of this Act" the words "in or from the State, as the case may be" shall be substituted

(2) In section 106(e) for the words "in pursuance of a licence granted under this Act", the words "in the State" shall be substituted.

Clauses 40 and 41 of the revised draft Bill provide accordingly.

4. Para 3(a) on p. 277: The fourth point is in regard to the proviso proposed to be added to the new section 6A. Section 6A gives power to Government to decide whether any preparation is or is not fit for human consumption or use. There is nothing to show that once the decision is given by Government, it becomes functus officio. It can review and alter its decision. The proviso suggested is unnecessary.

5. Para 3(b) on p. 279: The fifty point has been dealt with in para. 2 above.

6. Para 3(c) on p. 279: The sixth point is in regard to the addition of the proviso to section 40B(1). The suggestion may be accepted but the proviso may be recast as follows:-

> "Provided that no permit shall be granted to more than one member of a husehold at any one time". (Vide clause 17 of the revised draft Bill).

7. Para. 3(d) of p. 279:- Clause 18:- This suggestion may be accepted. Clause 18 of the draft Bill sent herewith has been suitably amended accordingly.

8. Para 3(e) on p. 279, Section 56:- Section 56 (2) may be amended as follows to carry out the suggestion of the Director, namely:-

> "(2) When a licence is cancelled under sub-section (1), a part of the licence fee proportionate to the unexpired portion of the term of such licence and the deposit made by the licensee in respect of such licence shall be refunded to him after deducting the amount due from him to the State Government".
>
> Clause 25 of the revised draft provides accordingly.

9. Para. 3(f), (g) and (h) on pp. 279-281: The amendments suggested may be accepted. These amendments have been carried out in the revised draft Bill sent herewith. (Vide clause 46, 47(4)(a) and (5)).

10. Para 4(1) on p. 281: The view taken by the Director of Excise that section 24A will have the effct of allowing the manufacture of medicinal and toilet preparations without any licence, permit or authorisation, is not correct. Under section 30 of the Bombay Prohibition Act it is specifically provided that the State Government may by rules or order in writing authorise an officer to grant licences for the possession of denatured spirit, rectified spirit and alcohol for industrial or medical purposes. Similarly, section 31 provides that the State Government may authorise an officer to grant licences to any person for the possession of liquor on the ground that such liquor is required by such person for a bona fide medicinal, scientific and industrial or such like purpose. It will thus appear that the possession or purchase of liquor or alcohol for the purpose of manufacturing medicinal or toilet preparations can be controlled under the aforesaid two sections and when the applicant makes an application for the possession or purchase of such alcohol or liquor Government would know from the application that it is required for medicinal or a toilet preparation. The Government have got power to impose conditions subject to which a licence under the Act can be issued. The view, therefore, taken by the Director that the manufacture of medicinal or toilet preparations can be done from ingredients among which is liquor or alcohol, without there being any authorisation, is not correct. However, there is no objection to making a specific provision in this behalf on the lines of new section 31A suggested by the Director. Clause 9 of the Bill provides accordingly.

11. Para 4(2) on p. 281: The suggestion may be accepted The amendment has been carried out in the proposed new section 59A (vide clause 27).

12. Para 4(3) on p. 282: The contention raised by the Director has no substance. If the Director comes to the conclusion that the article manufactured is an intoxicating

liquor, it will be subject to the provisions of the Act and an opportunity will have to be given to the manufacturer to comply with the provisions. The point is obvious.

13. Para 4(4) on p. 283: This is a typing mistake and has been corrected.

14. Paras. (5) and (6) on p. 283: The amendments suggested may be accepted. These amendments have been carried out in the revised draft (vide clauses 7 and 9).

15. Para (7) on p. 283: The words "which may be used as an intoxicating liquor" in the proposed new section 59A have been deleted (vide para. 11 above).

The second proposal of the Director to insert an additional sentence in the manner shown by him would be repugnant to the provisions of section 6A proposed to be inserted. Under section 6A it shall be the duty of the Board to advise the State Government on a question whether any medicinal or toilet preparation is unfit for use as intoxicating liquor. In the American Act there was no provision on the lines of section 6A of the Act and therefore a specific percentage by volume of alcohol to be contained in any medicinal or toilet preparations was specified in the Act. No such power is necessary under the Act. If the Director has authorised certain percentage in the preparation of a medicinal or toilet preparation, it will make the position of the Medical Board akward in deciding that a particular medicinal or toilet preparation containing alcohol is unfit for use as intoxicating liquor.

16. Para. 4(8) on 285: There is no objection to accepting the proposal to amend section 59A on the lines suggested by the Director. In the American Act there is a similar provision. The amendment has been carried out in the revised draft (vide clause 27, new section 59A).

17. Para. 4(9) on p. 285: There is no objection to accepting the amendment suggested by the Director. The Amendment has been carried out in the revised draft (vide ~~xxx~~ clause 27, new section 59B).

18. Para 4(10) on p. 285: For the reasons stated in para. 12 above, it is not necessary to accept this amendment. It has not, therefore, been embodied in the revised draft. However, the proposed provision would be inconsistent with the provisions of the proposed new section 6A under which the power to determine whether or not any medicinal or toilet preparation containing alcohol is unfit for use as an intoxicating liquor lies with the Board of Experts and Government.

19. ~~R~~ Para 4(11) on p. 287: This is consequential to the provision referred to in para. 16 above and has been carried out in clause 31 (vide new section 67A(1)(c)).

20. Para. 4(12) on p. 287: There is no objection to amending section 67 in the manner suggested by the Director. The amendment has been carried out in clause 31 (vide new section 67A(2)).

21. A revised draft Bill embodying all the amendments referred to above is sent herewith.

Sd/- T.R.D

Additional Secretary to Government.

U.R. to R.B. No. 4496, dated the 25th March 1952.

EVY. 4/7.

Legal Department.

Item 5 in the Statement at p. 44 ante:

The proposal is to make the sarpanch of a village panchayat responsible for ging information of offence against the Prohibition Act. For this purpose, section 234 will bave to be suitably amended. A requisite draft amendment is sent herewith. It may be reserted as clause 46-A in the draft Bill at page 337 of the Revenue Department File No. 539/51-C-I. The other clauses of the draft Bill may be suitably renumbered at the time of preparing final copies of the draft Bill.

Item 8 in the Statement at p. 47 ante:

It appears that the object in view cannot be achieved by issuing a notification under the previse to section 117 to extend the scope of the previse to the whole of the State. It is necessary to amend section 117 suitably. A requisite draft amendment is sent herewith for including it in the draft Bill after caluse 44.

Item 10 at page 49 ante:

In order to bring section 85 in line with section 66, a requisite draft amendment is sent herewith It may be included in the draft Bill after clause 37.

Para. 1 of Chief Secretary's not at p. 93 ante.

The proposal is that gundas and gangsters who terrorise, the people and indulge in illicit liquor traffic should be treated on the same footing as these engaged in terrorist activities and provision may be made for their externment and detention.

Section 136 of the Act gave power to arrest and make orders detaining, a restricting movements or actions of certain persons and externments. In Iram Bulsara vs. State of Bombay the High Court has pointed out that it is not competent to the legislature to order preventive detention or externment with regard to offence which fall

offences which have no direct connection with public order. Preventive detention or externment should be restricted to reasons connected with the security of State, the maintenance of public order or the maintenance of supplies and services essential to the community. "Prohibition law does not deal with maintanance of public order (a distinction has to be drawn between public order and maintenance of public order), the security of the State or the maintenance of supplies and services essential to the community". Therefore the High Court held that section 136(1) which provided for preventive detention was invalid. Similarly, the High Court held the provisions of section 136 providing for externment as invalid as unreasonably restricting the right of free movement and residence of the citizens and offending against clauses (d) and (e) of article 19(1) of the Constitution. In view of the High Court judgment which has been confirmed by the Supreme Court in State of Bombay versus Fram Bulsara (1951) S.C.R. 682, the proposal cannot be accepted. This view of the High Court has been upheld by the Supreme Court, which also held that section 136 was ultra vires of the Constitution. If there are grounds to believe that a person is in the habit of terrorising other persons, it can be held that he is causing or calculated to cause alaram, danger or harm to the person or property of such persons and action for his externment can be taken under section 56 of the Bombay Police Act, 1951. He can also be externed if there are three convictions against him in three years for offences against the Bombay Prohibition Act. Similarly, such a person can also be dealth with under the Bombay Preventive Detention Act on the ground that his activities are prejudicial to the maintenance of public order.

Para. 2 of the Chief Secretary's note.

In the case referred to above the the question

of health permits was also examined by the High Court and the Supreme Court. They hold that persons are entitled to such permits without being called as addicts. The Supreme Court upheld the validity of the Prohibition Act, not only on ground that it related to the Entry "Intoxicating liquors,", but also on the freund that it falls within the Entry "Public Health" under the Constitution. In holding this the Supreme Court referred to article 47 in the Constitution. Article 47 of the Constitution lays down that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and thus recognizes the need to allow consumption of intedicating drinks for medicinal purposes. Accordint to the view taken by the Courts the use of alcoholic liquids for medicinal purposes can be in two ways:- One for those who require them in illness or on emergent occasions as medicine. The other one would be for those who may have been accustomed or habituated to consume liquor and in view of their medical advisers the steppage of such use would be determintal to their health. The health permits which are referred to in section 40 for both the aforesaid purposes and with the mention of the said permits in section 40 it was possible to defend the validity of the Act as being consistent with article 47 of the Constitution. It will, therefore, be opposed to the Constitution to omit the provision relating to the grant of health permits and its ommission would affect the validity of the Act. Whether the use of country liquor should be permitted for the purpose of health is entirely a matter of policy. But it should be noted that the manufacture of country liquor has been totally prohibited by the

Act, while the import of foreign liquor cannot be so prohibited by the State Legislature under the Constitution. Only restrictions which can be put in regard to foreign liquor are with respect to its sale, possession and consumption. But such restrictions have to be consistent with the Constitution. The provision in the Act permitting the use of foreign liquor for health or medicinal purposes is, therefore, in consonance with the Constitution. Moreover, section 40 of the Prohibition Act merely provides for the grant of health permits to cetain persons. The conditions on which such permits are to be granted are to be prescribed ~~them~~ by rules or orders to be made under the Act. If the health permits are misused, the rules or orders relating to their grant require to be modified. Such misuse can be prevented by the amendment of the said rules and orders and not by emmission from the Act itself.

Marginal note of the Minister (Prohibition) at p. 335 of Revenue Department file No. 539/51-I.

To cover the case of messes and canteens for the Air Force, for clause 15 of the draft Bill a revised draft clause is sent herewith. The expression "armed forces" includes the naval, military and air forces. The revised clause may be substituted for clause 15 of the draft Bill.

Sd/- J-R-D

Additional Secretary to Government.

U.R. to R.D. (Confl)., No. 77-L, dated the 2nd July 1952.

EVY. 5/7.

Minister (Prohibition)

At 'A' on p. 3 ante, R.L.A. discusses as to what is meant by the consumption of alcohol for medicinal ~~xxx~~ purposes. One use of it is in illness or under emergency conditions. R.L.A. says that its consumption by persons who may be used to it and its subsequent withholding, migh affect their health would be also covered under article 47 of the Constitution.

I take it that the words "for medicinal purpose, do not necessarily mean the samething as "for medicinal purpose" would mean its use in a prescription written out by a docter and should not include the consumption of Alcohol for health purpose. Ad overwhelming proportion of the population does not use alcohol ~~xx~~ and their health does not suffer. The withholding of alcohol may affect some people for some time, but such withholding may be done gradually so that the person concerned gets out of the habit of consuming alcohol. M. (Law) may consider this aspect of the question. If what is stated above is legally possible, then alcohol would be prescribed for medicinal purpose only in illness or in an emergency; and so far as the consumption of alcohol is concerned in case of persons used to it, gradual withdrawal leading to complete stoppage may be regulated under Rules to be framed under the Act.

Please discuss
Sd/- D.N.D.
10/7
Jt. Sec. L.D.

Sd/- J.M?M.

M(Law)

In consonance with the policy of total prohibition, Chapter III of the Bombay Prohibition Act, 1949, contains prohibitions against the consumption, use etc., of intoxicants in sections 12 to 24. The Act was passed in 1949, before the Constitution came into force. But after the Constitution came into force the validity of sections 12 to 24 was challenged in the Bulsara Case on the ground that they offend against article 19(1)(f) of the Constitution which guarantees freedom to citizens "to acquire, hold and dispose of property". (See paras 8 to 22 of Bulsara's Application to the High Court). In answer to this contention it was urged t that clause (5) of article 19 provides that nothing in sub-clause (f) of clause (1) of the article shall affect the operation of any existing law in so far as it imposes or prevents the State from making any law imposing reasonable restrictions on the exercise of any rights conferred by clause (1) of the article in the interests of the general public. In support of this argument reliance was placed on section 11 and the provisions in Chapter IV of the Bombay Prohibition Act. 2. Section 11 provides that notwithstanding anything contained in the provisions of Chapter III (i.e. sections 12 to 24) it shall be lawful to import, export, transport, manufacture, sell, buy, possess, use or consume any intoxicant in the manner and to the extent provided by the other provisions of the Act, rules, regulations and orders or in accordance with the terms and conditions

a licence, or permit granted thereunder. In accordance with this provision Chapter IV of the Act contains xxxxx several provisions for the grant of licences and permits. Chapter IV contains sections 31 and 40 which are relevant for the present purpose. Section 31 empowers the State Government or any officer authorized by it to grant licences to any person or institution for the sale or possession of any liquor or other intoxicant for a bona fide medicinal, scientific, industrial or such like purpose. Such person would not then obtain a separate licence for the purpose of such liquor. Section 40(1)(b) provides that the State Government or any authorised officer may grant permits for the use or consumption of foreign liquor to persons on the ground that the health or such person shall be seriously and permanently affected, if such person is not permitted to use or consume such liquor. It was urged on behalf of Government the although it is for the Courts to decide whether any restrictions imposed on the freedoms guaranteed by article 19, the reasonableness of any restrictions imposed will have to be determined by the provisions of the directive principles and so far as this case is concerned by the directive principle in article 47 which directs a State to endeavour to bring about prohibition of the consumption of intoxicating drinks which are injurious to health, except for medicinal purposes. The High Court did not accept this argument and did not consider that the reference to the directive principle in article 47 was relevant. In its opinion the directive principle had no binding force and

also the Bombay Prohibition Act was enacted long before the Constitution came into force. The High Court also held that the Act "appears to have gone beyond the scope of the directive inasmuch as it does not *prima facie* appear to have made adequate provision for allowing the use and consumption of intoxicating drugs for medicinal purposes."

3. In dealing with section 31, it observed as follows:-

> " Section 31 of the Act which authorises the Provincial Government to issue licences *inter alia* for medicinal purposes is restricted only to manufacture, export, import, transport, sale or possession or liquor and the proviso to that section provides that any person who obtains liquor for *bona fide* medicinal purpose from such a licence holder does not need a permit tp possess it; but neither such person nor the permit holder appear to have been empowered to use or consume such liquor. The Bombay Foreign Liquor Rules, 1950, do contain a provision under Rule 68 for a permit to keep two drams of brandy or rum for use in an emergency, but sub-section (7) contains a somewhat extraordinary provision ~~x~~ that the permit holder shall not allow the use of such brandy or rum to any one but a member of his household even in an emergency. If a citizen is impelled by consideration of humanity to help a fellow citizen in an emergency he must

must be prepared to underge the penalty prescribed by the Act for a breach of the law. Surely if brandy or rum have a legitimate medicinal use in an emergency, we find it difficult to believe that an enlightened Government should with to forbid a permit holder to allow a needy person the use of rum or brandy in an emergency if such person does not happen to possess it. There can in such a case be no fear of the abuse of the permit because the quantity allowed to the permit holder under the Rules is so small that he is not likely to offer any part of it wantonly to a neighbour except for reasons of humnaity".

In dealing with section 40(1)(b) the High Court has observed as follows:-

"When a person applies for a permit on the ground of health, he has to forward with it a Certificate from the medical board and when we turn to the form of this certificate, it requires the medical board to declare the applicant an addict. Therefore the position is that it is only xxxkk on the applicant being found an addict by the medical board that he would be entitled to obtain a permit on the ground health. Under section 40 a person is entitled to a permit if his health would be seriously and permanently affected if he was not permitted to use or consume liquor. It is not only in the case of addicts that such a contingency would arise. Even persons who are not addicts may have been ac-

> customed to drink for a long period of time and a sudden discontinuance of drink may seriously and permanently affect their health. It may also happen that without being accustomed to drink at all a person may contract an illness which may require the use by him of alcoholic drink under medical opinion. To be an addict, in our opinion, means something more than being merely accustomed to drink. We must give to it its plain natural meaning. It is certainly not a term of art, and giving to it its plain natural meaning, the expression "addict" does carry with it a sense of moral obloquy. The intention of the Government seems to be that only persons who confess that they are deviating from standards of morality should be given permits. Now, insistence upon a medical certificate in this form is not at all warranted by the provisions of the Act. The authority which issues permits has only to be satisfied that the conditions laid down in section 40(1)(b) are satisfied. It cannot in any way add to these conditions".

In the above passage the High Court has expressly stated that the use of alcohol would be necessary not only in the case of addicts, but in the case of other persons who are not addicts, but who may have been accustomed to drink for a long period of time and a sudden discontinuance of drink may seriously and permanently affect their health.

High Court has added that without being accustomed to drink, a person may contract illness which may require the use by him of alcoholic drink under medical advice. From the observations of the High Court in regard to sections 31 and 40(1)(b) of the Bombay Prohibition Act, it would appear that apart from and irrespective of the provisions of article 47 of the Constitution and the mention therein for an exception being made for medicinal purposes, the High Court has held that the restrictions imposed by the Prohibition Act on the use or consumption of intoxicants are reasonable having regard to such circumstances as are mentioned in sections 31 and 40(1)(b), otherwise a complete ban on the use and consumption of intoxicants would be in violation of the freedom guaranteed by article 19(1)(f) of the Constitution and would not be legal. According to the decision of the High Court it would, therefore, be immaterial what meaning should be attached to the words "medicinal purposes".

4. When the matter went to the Supreme Court, that Court upheld the validity of the Act on the ground of public health. In doing so it referred to article 47 of the Constitution. It observed as follows:-

> " There is in my opinion another method of approaching the question which also deserves consideration. Remembering that the object of the Prohibition Act was not merely to levy excise duties but also to prohibit use, consumption, possession, and sale of intoxicating liquor, the

The High Court has added that without being accustomed to drink, a person may contract illness which may require the use by him of alcoholic drink under medical advice. From the observations of the High Court in regard to sections 31 and 40(1)(b) of the Bombay Prohibition Act, it would appear that apart from and irrespective of the provisions of article 47 of the Constitution and the mention therein for an exception being made for medicinal purposes, the High Court has held that the restrictions imposed by the Prohibition Act on the use or consumption of intoxicants are reasonable having regard to such circumstances as are mentioned in sections 31 and 40(1)(b), otherwise a complete ban on the use and consumption of intoxicants would be in violation of the freedom guaranteed by article 19(1)(f) of the Constitution and would not be legal. According to the decision of the High Court it would, therefore, be immaterial what meaning should be attached to the words "medicinal purposes".

4. When the matter went to the Supreme Court, that Court upheld the validity of the Act on the ground of public health. In doing so it referred to article 47 of the Constitution. It observed as follows:-

> " There is in my opinion another method of approaching the question which also deserves consideration. Remembering that the object of the Prohibition Act was not merely to levy excise duties but also to prohibit use, consumption, possession, and sale of intoxicating liquor, the

Legislature had the power to legislate upon the subjects included in the Act not only under entyy x 31 of List II, but also under enty 14, which refers inter alia to public health. Article 47 of the Constitution which it contains one of the directive principles of State policy, provides that "the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health". This Article has no direct bearing on the Act which was passed in 1949, but a reference to it supports to some extent the conclusion that the idea of prohibition is connected with public health, and to enforce prohibition effectively the wider defintion of the word "liquor" would have to be adopted so as to include all alcoholic liquids which may be used as substitutes for intoxicating drinks, to the detriment of health. On the whole, I am unable to agree with the High Court's finding and hold that the definition of "liquor" in the Bombay Prohibition Act is not ultra vires".

~~Although~~

Although in its opinion article 47 had no direct bearing on the Act, it stated that in judging the reasonableness of the restrictions imposed by the Act, it has to bear in mind the directive principle of the State policy set forth in article 47. It, however, entirely agreed with the observations of the High Court in regard to section 40(1)(b) which deal with health permits and directed that the word "addict" introduced in permits issued under the Foreign Liquor Rules made under the section should be replaced by the words mentioned in the section itself i.e. "persons whose health will be seriously and permanently affected, if they are not permitted to use or consume liquor".

5. For the above reasons, it is clear section 31 of the Bombay Prohibition Act, 1948, applies to the use of alcohol in the case of sudden and serious illness while section 40(1)(b) applies to cases in which such use may be necessary in view of the habits or the physical conditions of a person which necessitate such use under medical advice. It is also clear from the judgments both of the High Court and the Supreme Court that apart from the directive principle embodied in article 47 of the Constitution, a complete ban on the use of alcohol without providing for exceptions or facilities embodied in section 31 as well as section 40(1)(b) would amount to reasonable restriction on the freedom guaranteed under article 19 and would be illegal. As is clear fom the wording and marginal note of article 47, the prohibition therein of the use of intoxicating

drinks relates to public health. It was an aspect of the case also that the Supreme Court upheld the validity of the Bombay Prohibtion Act. The word 'medicinal' according to its dictionary meaning means "having properties of a medicine; adapted to medical use or purpose; curative (Century Dictionary quoted Aiyar's Law Lexicon). In the Oxford Dictionary the meaning given is "of medicine; of healing properties". The purpose may not be purely curative. It may be preventive or prophylactic i.e. tending to ward off disease or bodily infirmity. The restricted meaning proposed to be given to the words 'medicinal purposes' is not warranted by any authority. No Court would, therefore, be inclined to hold that the reference to medicinal purposes in that article relates to the cases contemplated by section 31 and not to these falling under section 40(1)(b). The proposal for the deletion of section 40(1)(b) from the Bombay Prohibition Act would affect the validity of the Act and would be unconstitutional.

The purpose may not be purely curative. It may be preventive or prophylactic i.e. tending to ward off bodily infirmity.

Id. J.R.D.
12/7.

H.M.(Law)

H.M. (Law) has directed that the Advocate General may be requested to give his opinion urgently.

Id. J.R.D.
12/7.

BVY. 5/7.

Legal Department.

SECRET.
IMMEDIATE.

The point for consideration in this case is whether it will be legal or constitutional to omit what are known as "Health permits" which are provided for in section 40(1)(b) of the Bombay Prohibition Act, 1949. In this connection attention is invited to-

(1) Report of Shri Bhansali, Officer on Special Duty, page 54, slip T.

(2) Serial No. 26 at pages 24 and 25.

(3) Paragraph 2 of Chief Secretary's note at page 93.

(4) Additional Secretary (L.D.)'s note.

(5) H.M. (Finance & Prohibition)'s minute at page 103, and

(6) Additional Secretary (L.D.)'s further note at page 109.

Sd/- J.R.D

Additional Secretary to Government.

U.R. to the Advocate General.

I am in general agreement.

Sd/- M.P. Amin

13/7/52.

Minister (Law)

EVY. 5/7.

No. 15051/B.
Legal Department,

Bombay Castle (Bombay No. 1), 15th September 1952

From

Shri J.R. Dhurandhar,
Additional Secretary to the Government
of Bombay, Legal Department.

To

The Secretary to the Government of Bombay

Subject: The Bombay Prohibition (Amendment) Bill, 1952.

Sir,

With reference to article 200 of the Constitution of India, I am directed to forward herewith for being presented to the Governor the authentic copy of the Bombay Prohibition (Amendment) Bill, 1952, which was read for the third time and passed at the meetings of the Bombay Legislative Assembly and the Bombay Legislative Council held on the 16th August 1952 and the 21st August 1952, respectively.

2. The subject-matter of the Bill falls under entries 1, 8, 51, 64 and 66 in List II and entries 12, 19, 39 and 45 in List III in the Seventh Schedule to the Constitution of India. As the provisions of the Bill are repugnant to the provision of the Indian Evidence Act, 1872, which is an existing law relating to entry 12 in the concurrent legislative List, it is necessary to reserve the Bill for the consideration of the President with reference to article 254(2) of the Constitution of India.

3. I also forward herewith six copies of each

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1. Bill as introduced the Bombay Legislative Assembly with the Statement of Objects and Reasons
2. Bill as read for the third time and passed by the Bombay legislative Council.

3.	Extracts from the proceedings of the Bombay Legislative Assembly dated the 12, 14th and 16th August 1952 and of the Bombay Legislative Council, dated the 21st August 1952.	of the items Nos. 1 and 2 and two

copies of item No. 3 of the papers noted in the margin. The Bill was not referred to a select Committee.

Yours faithfully,

Sd/-

Additional Secretary to Government.

Copy forwarded with compliments to the Secretary to the Government of Bombay, Revenue Department.

EVY. 5/7.

No G-5-3031

615.

From

Shri S.B. Kulkarni, IAS,
Secretary to the Governor of Bombay.

To

The Secretary to the Bombay Legislature Department, Council Hall, Bombay 1.

Subject:- The Bombay Prohibition (Amendment) Bill, 1952.

RAJ BHAVAN,

GANESHKHIND, POONA. 7.

September 29, 1952.

Sir,

Referring to the Bombay Prohibtion (Amendment) Bill, 1952, which was passed by the Bombay Legislative Assembly and the Bombay Legislative Council on ~~xyx~~ August 16 and 21, 1952, respectively, I am directed to state, for the information of the Speaker and the Chairman that as the provisions of the Bill are repugnant to the provisions of the Indian Evidence Act, 1872 which is an existing law relating to entry 12 in the concurrent Legislative List, it is necessary to reserve the Bill for the consideration of the President - vide article 254(2) of the Constitution of India. The Governor has accordingly been pleased under article 200 of the Constitution to declare that he reserves the Bill for the consideration of the President.

Yours faithfully,

Sd/- S.B. KULKARNI,

Secretary to the Governor.

No. GS - 3032 Governor's Secretary's Office,
Raj Bhavan, Ganeshkhind, Poona 7,
September 29, 1952.

Copy forwarded with compliments for information to the Additional Secretary to Government, Legal Deptt., with reference to his letter No. 15051/B dated Sept. 15, 1952.

Sd/- S.B.K.
Secretary to the Governor.

RVV. 5/7.

No. G.S. 3244

From

The Secretary to the Governor of Bombay.

To

The Additional Secretary to Government,

Legal Department.

RAJ BHAVAN,

Bombay 6/Octr. 20, 1952.

Subject: The Bombay Prohibition (Amendment) Bill 1952.

Sir,

With reference to the correspondence ending with your letter No. 16963/B, dated October 14, 1952, on the above subject, I am to say that intimation has been received from the Government of India, Ministry of Home Affairs, that the President assented to the Bombay Prohibition(Amendment) Bill, 1952, on October 15. 1952.

Yours faithfully,

Sd/-

for Secretary to the Governor of Bombay.

EVY. 5/7.

No. GS- 3284.

From

The Secretary to the Governor of Bombay.

To

The Additional Secretary to Government,

Legal Department, Bombay 1.

Subject: The Bombay Prohibition (Amendment) Bill, 1952.

RAJ BHAVAN,

Bombay, October 22, 1952.

Sir,

In continuation of my letter No. GS-3244 dated October 20, 1952, I am directed to return herewith authentic copy of the Bombay Prohibition (Amendment) Bill, 1952, with the President's assent signified thereon.

Yours faithfully,

Sd/-

for Secretary to the Governor.

EVY. 5/7.

Acts.

Publication of the

Bombay Prohibition (Amendment) Act, 1952.

GOVERNMENT OF BOMBAY,
Legal Department,
Resolution No. 17475/B.

Bombay Castle, 22nd October 1952.

Letter to the Secretary to the Governor No. 16051/B, dated the 15th September 1952.

Letter from the Secretary to the Governor No.G.S. 3244, dated the 20th October 1952.

"With reference to the correspondence ending with your letter No. 16963/B, dated October 14, 1952, on the above subject, I am to say that intimation has been received from the Government of India, Ministry of Home Affairs, that the President assented to the Bombay Prohibition (Amendment) Bill, 1952, on October 15, 1952".

RESOLUTION:- The law should be publied as Bombay Act No. XXVI of 1952 in the Bombay Government Gazette dated the 22nd October 1952.

2. The Act should be translated into Marathi, Gujarati, Kannada and Hind (in Devnagari script) and the translations should be publied in the Bombay Government Gazette.

3. A copy of the Act should be forwarded to the Revenue Department.

By order of the Governor of Bombay,

Sd/-

S.W. DESURANDHAR,

Assistant Secretary to Government.

To

The Manager, Government Central Press, Bombay (with a copy of the Act and with a request that 30 Gazette copies of the Act may be forwarded to the Legal Departmentand 10 copies to the Revenue Department) etc.

EVV. 5/7.